Supreme Court, U.S.
FILED
OCT 14 1999
OFFICE OF THE CLERK

No. 99-442

IN THE

Supreme Court of the United States

LOCAL 150, INTERNATIONAL UNION
OF OPERATING ENGINEERS,

Petitioner,

v.

R.L. COOLSAET CONSTRUCTION CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LAWRENCE D. LEVIEN, P.C.
VICTORIA L. BOTVIN*
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

Attorneys for Respondent

* *Counsel of Record*

October 14, 1999

155530

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed a damages award where the district court found that the damages incurred were actual damages and were directly attributable to petitioner's conduct?

2. Whether the court of appeals correctly affirmed an award of prejudgment interest where prejudgment interest was necessary to full compensation?

PARTIES TO THE PROCEEDING

All parties are identified in the caption to this case.

CORPORATE DISCLOSURE STATEMENT

Respondent, R.L. Coolsaet Construction Co. has no parent corporation or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	1
I. Petitioner Engaged In A Strike Held Unlawful By The District Court And The Court Of Appeals.	2
II. Respondent's Damages.	4
Reasons for Denying the Writ	6
I. The Seventh Circuit's Decision On Damages Does Not Conflict With Holdings Of This Court Or The Ninth Circuit.	7
II. The Seventh Circuit's Award Of Prejudgment Interest Does Not Conflict With Holdings Of This Court Or The Second Circuit.	9
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Beelman Truck Co. v. Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 525, 33 F.3d 886 (7th Cir. 1994) 10

Gorenstein Enters., Inc. v. Quality Care-USA, Inc., 874 F.2d 431 (7th Cir. 1989) 9, 10

Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton, 377 U.S. 252 (1964) 8, 9

Matson Plastering Co. v. Plasterers & Shophands Local No. 66, 852 F.2d 1200 (9th Cir. 1988) 8

Wickham Contracting Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, AFL-CIO, 955 F.2d 831 (2d Cir. 1992) 10, 11

Statutes:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 158(b)(4) 2, 3

29 U.S.C. § 185 ..... 2, 3

Rule:

Sup. Ct. R. 10 ..... 7, 10

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 177 F.3d 648 (7th Cir. 1999). Pet. App. 1.[1] The order of the Central District of Illinois is not reported. Pet. App. 26.

STATEMENT OF JURISDICTION

The district court entered judgment in favor of R.L. Coolsaet Construction Co. on November 24, 1997. The Seventh Circuit affirmed on May 7, 1999. A petition for rehearing *en banc* was denied on June 14, 1999. This Court granted petitioner until September 13, 1999, to file its petition for certiorari. The petition was filed on September 13 and docketed on September 14, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The petition for writ of certiorari correctly identifies the relevant statutes in this case.

STATEMENT OF THE CASE

This action arises out of a strike by petitioner Local 150, International Union of Operating Engineers, when Natural Gas Pipeline Company of America hired both union and non-union contractors (including respondent, a unionized

1. "Pet. App." refers to the appendix attached to Local 150's petition for writ of certiorari. This brief also uses the following citation forms: "Pet." refers to Local 150's petition for writ of certiorari; and, "S.A." refers to Local 150's short appendix submitted to the Court of Appeals for the Seventh Circuit.

contractor) to repair pipelines at its gas storage facility in Herscher, Illinois. Pet. App. 2. On respondent's suit, the district court and court of appeals found the Union's strike to be an illegal secondary boycott in violation of 29 U.S.C. § 158(b)(4) of the National Labor Relations Act ("NLRA") and a breach of the no-strike clause in the collective bargaining agreement between petitioner and respondent, in violation of section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Pet. App. 25, 48.

In its petition, the Union does not question the lower courts' conclusions that it engaged in an illegal secondary boycott and that it breached the no-strike clause in the parties' collective bargaining agreement. Instead, petitioner asserts only that the evidence does not support the computation of damages made by the district court and affirmed by the court of appeals. Petitioner simply reargues its own witnesses' version of the events, including witnesses who were expressly discredited by the district court, and asserts that, on the issues of damages and prejudgment interest, the Seventh Circuit improperly interpreted the factual evidence before it.

I. Petitioner Engaged In A Strike Held Unlawful By The District Court And The Court Of Appeals.

In June 1991, Natural Gas hired respondent R.L. Coolsaet Construction Co., a union contractor, to perform maintenance and repair work on natural gas pipelines leading to its compressor Station 201. Pet. App. 2. Respondent had recognized petitioner, Local 150, as the representative of certain of its employees and had entered into a collective bargaining agreement with petitioner for the Natural Gas job. *Id.* Natural Gas also hired Haley Brothers Excavating Company, a non-union contractor, to perform work on the water pipelines in the fields surrounding Station 201. *Id.*

Shortly after the arrival of Haley, employees of respondent Coolsaet who belonged to petitioner Local 150 initiated a picket at Station 201 to protest Natural Gas's hiring of a non-union contractor, Haley. Pet. App. 3-4. Petitioner did not set up the picket at the Haley jobsite, however, which was located miles away from Coolsaet's site, nor did petitioner set up the picket at Haley's offices. Pet. App. 3-4, 40. Instead, petitioner set up its picket in front of respondent Coolsaet's jobsite and outside the entrance gate to Station 201, which was used exclusively by Coolsaet employees. Pet. App. 3-4. As a result, unionized Coolsaet employees refused to cross the picket line and Coolsaet's job was completely shut down for eleven working days. Pet. App. 4, 17. In addition to the eleven days of the strike itself, Coolsaet's project was prolonged by twelve days as a result of the strike. Pet. App. 17.

The district court found that petitioner's picketing was a violation of section 8(b)(4) of the NLRA, because petitioner did not focus its picket on Haley, the employer with which it had a grievance; rather, petitioner intentionally focused its picketing activity on secondary employers, i.e., Coolsaet and Natural Gas. Pet. App. 54. The court of appeals affirmed the district court's decision and found that at least one of petitioner's objectives was to unlawfully pressure Coolsaet and Natural Gas into forcing Haley off the Herscher site. Pet. App. 11. The district court also concluded that petitioner's strike and picketing breached the no-strike clause in the parties' collective bargaining agreement, in violation of section 301 of the LMRA. Pet. App. 48. Based on the district court's review of the structure of the agreement and its bargaining history, the court of appeals affirmed this decision. Pet. App. 17.

II. Respondent's Damages.

The district court found that respondent was damaged as a direct result of petitioner's illegal strike. Pet. App. 49. In particular, the court found that respondent suffered injury both because of eleven days of work stoppage for the strike itself and also because of an additional period of two weeks after the strike ended when respondent was still recovering from the strike's effects. Pet. App. 65-66. The court found that non-strike injury flowed from the loss of momentum caused by the strike, the work exposed to the elements during the strike that needed to be redone when the job resumed, and the fact that one-third of respondent's welder force did not return to the Herscher project after the strike and had to be replaced. Pet. App. 66. In reaching its factual conclusions, the district court explicitly discredited the testimony of three of petitioner's witnesses (Benefield, Quigley, and Seale) on key factual issues. Pet. App. 49. As the court stated, "their testimony concerning facts which were critical in deciding the actual issues before the Court appeared vague and selective and, therefore, lacked credibility." *Id.*

The district court determined that there was a reasonable nexus between the unlawful strike and the eventual two weeks of delay after the strike had ended. Pet. App. 66. Consequently, the court held that respondent was entitled to damages for its pecuniary losses for that period, as well as for the time of the strike itself. Pet. App. 65-66. It determined that the injury sustained by respondent included costs for payroll expenses, equipment costs, legal bills, transportation costs, two weeks additional payroll, insurance, fringe benefits, rig rentals, labor costs, and office-related costs, for a total of $329,467.46. Pet. App. 69. According to the district court, this amount was a "reasonable approximation of the actual monetary injury that Coolsaet suffered as a result of the Union's unlawful conduct." *Id.*

As instructed by the district court, the parties filed supplementary briefs on the issue of prejudgment interest. The district court awarded Coolsaet prejudgment interest in the amount of $16,097.14. On reconsideration, Coolsaet argued that the court had failed to consider the five years between the strike and the judgment, and, subsequently, the district court amended its final judgment and awarded respondent prejudgment interest of $105,221.12. The district court did not, however, grant Coolsaet prejudgment interest for equipment costs which were included as part of its damage award, because they were not "out-of-pocket" expenses. S.A. 56. Local 150 filed a notice of appeal, contesting the district court's rulings, including the final judgment and amended final judgment awarding prejudgment interest. Coolsaet cross-appealed, contesting the district court's failure to award prejudgment interest on equipment costs.

The Seventh Circuit affirmed all of the district court's liability conclusions. Pet. App. 25. It agreed that Local 150 had engaged in illegal secondary activity and breached the no-strike clause of the collective bargaining agreement, discussing the evidence that supported the district court's decision. Pet. App. 9, 11, 17. The court of appeals also refused to disturb the credibility determination made by the district court, pointing out that when findings of fact are based on the credibility of witnesses, appellate review is particularly deferential. Pet. App. 10. As the court of appeals stated, "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.*

The Seventh Circuit also affirmed the district court's lengthy calculation of damages, finding that the damages

incurred were compensable because they were "directly attributable to the strike." Pet. App. 18. However, the court reversed the district court's failure to award prejudgment interest to respondent for equipment costs. Pet. App. 22-24. The court explained that there was no reason, nor any supporting case law, for treating the equipment costs differently than other damages awarded and that without prejudgment interest "plaintiff is not fully compensated." *Id.* As a result, the Seventh Circuit concluded that respondent also was entitled to prejudgment interest on its equipment costs and remanded for a recalculation of prejudgment interest. Pet. App. 24-25.

Local 150 subsequently filed a petition for a rehearing and suggestion for rehearing *en banc*. The court of appeals denied the petition, stating that "no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing." Order of June 14, 1999.

REASONS FOR DENYING THE WRIT

Rather than present a genuine conflict or other basis sufficient to support certiorari, petitioner merely repeats its unabashed efforts to overturn credibility assessments and evidentiary conclusions made by the district court. Such factual determinations are of course within the sound discretion of the trial court and do not warrant this Court's review. Consequently, the petition does not raise any question worthy of this Court's consideration.

I.

THE SEVENTH CIRCUIT'S DECISION ON DAMAGES DOES NOT CONFLICT WITH HOLDINGS OF THIS COURT OR THE NINTH CIRCUIT.

Petitioner argues that the Seventh Circuit erred in affirming a damages award where Coolsaet failed to show the damages were incurred by reason of unlawful conduct or were actually sustained by Coolsaet. Pet. 10. However, the sole support offered by petitioner for this position is its repeated assertion of a view of the facts that was rejected by the district court. Pet. 11-14. Indeed, petitioner argues nothing more in its petition than what was asserted to the Seventh Circuit, which aptly observed, "[e]ssentially, the union counters each key fact with its own version of events, reiterating what it argued before the district court." Pet. App. 10. As provided in this Court's Rules, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." Sup. Ct. R. 10. Moreover, petitioner has not identified any objective or documentary evidence that even remotely supports its version of events, much less demonstrates that the credibility findings were manifestly incorrect. Instead, petitioner makes the insufficient argument that the court of appeals erred in not approving its version of events.[2] Then, in the final

2. Demonstrating the extent to which the petition is based on petitioner's refusal to accept the district court's credibility assessments and factual findings, petitioner's statement of the case repeatedly cites to the trial transcript, including testimony expressly discredited by the district court, rather than to the district court's actual findings of fact. Pet. at 2, 4, 6, 18. In doing so, petitioner relies on the testimony of its witnesses, Benefield, Quigley and Seale,

(Cont'd)

paragraphs, petitioner asserts that the Seventh Circuit's decision is in conflict with a Ninth Circuit decision and with decisions of this Court. That assertion is simply untrue.

Petitioner first purports to identify a conflict with the Ninth Circuit decision in *Matson Plastering Co. v. Plasterers & Shophands Local No. 66*, 852 F.2d 1200 (9th Cir. 1988). The claim is unmeritorious. While petitioner correctly notes that *Matson* holds that "damages recoverable under section 303 include actual compensatory damages for out-of-pocket expenses paid to third parties," neither this passage nor the holding in that case states that such expenses are the only injuries compensable under section 303. 852 F.2d at 1203; Pet. 14. As the Seventh Circuit recognized when petitioner asserted this argument below, "[n]othing in *Matson* [ ] supports this constrained approach to damages. On the contrary, that court discussed lost profits — something neither out of pocket or paid to third parties — as a recoverable item under the NLRA." *Id.* at 1202; Pet. App. 19-20. In short, the conflict asserted by petitioner does not exist.

Similarly, the Seventh Circuit's decision is perfectly in accord with the principles espoused by this Court in *Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton*,

(Cont'd)

yet fails to reveal that the district court discredited their testimony as "vague and selective and, therefore, lack[ing] credibility." Pet. App. 49. For example, petitioner supports its statement that Union steward Seale "is not an agent or officer of the Union" by referring to the trial transcript of Seale's testimony, without mentioning that the district judge expressly discredited this testimony. Equally misleading, petitioner fails to point out that prior to trial the parties *stipulated* that Seale is an agent or representative of the Union. Pre-Trial Order, p. 9.

377 U.S. 252 (1964). This Court held that recovery for "a union's peaceful secondary activities proscribed by s[ection] 303 should be limited to actual, compensatory damages." *Id.* at 260. That holding is consistent with the Seventh Circuit decision herein, which concluded that the twelve-day delay, the work that needed to be redone, and the problem re-mobilizing the workforce were "directly attributable to the strike and the expenses associated with them are compensable." Pet. App. 18. Thus, the damages awarded to respondent were "actual compensatory damages" in accordance with this Court's precedent. Petitioner's assertion that Coolsaet's damages were not actually sustained by Coolsaet is merely another effort to overturn the factual conclusions made by the lower court.

II.

THE SEVENTH CIRCUIT'S AWARD OF PREJUDGMENT INTEREST DOES NOT CONFLICT WITH HOLDINGS OF THIS COURT OR THE SECOND CIRCUIT.

Petitioner erroneously asserts that the Seventh Circuit erred in affirming the award of prejudgment interest because petitioner's conduct was not in fact intentional or outrageous. Pet. 15. In support of this proposition, petitioner misrepresents the Seventh Circuit case, *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989), and claims that prejudgment interest is available "only where 'the violation was intentional, and indeed outrageous.' " Pet. 15.

Even if this statement of the law were true, this error would not be the proper basis for granting a petition for a writ of certiorari, as the error would merely be the

"misapplication of a properly stated rule of law." Sup. Ct. R. 10. However, the statement is also patently incorrect. In *Gorenstein*, the Seventh Circuit announced a rule that "prejudgment interest should be *presumptively* available to victims of federal law violations" and that it is "*particularly appropriate*" where "the violation was intentional, and indeed outrageous." 874 F.2d at 436 (emphasis added). Petitioner's error is in the assertion that the circumstances in which prejudgment interest is "particularly appropriate" are the only ones in which it is allowed. Similarly, the court in *Beelman Truck Co. v. Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 525*, 33 F.3d 886 (7th Cir. 1994), decided that the union had engaged in unlawful, intentional conduct, but did not hold that intentional conduct was a required condition of entitlement to prejudgment interest. *Id.* at 892.

Equally spurious is petitioner's attempt to fabricate a conflict among the circuits. This argument is also based on petitioner's attempt to recast the facts found by the courts below. After providing a lengthy discussion of the Second Circuit decision in *Wickham Contracting Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, AFL-CIO*, 955 F.2d 831 (2d Cir. 1992), petitioner maintains that this decision supports its conclusion that prejudgment interest is only available when the violation of federal law is intentional or outrageous. Pet. 16. Petitioner then offers its own version of the facts, insisting that its picketing was not intentional and that "Local 150 acted innocently." Pet. 18-19. This argument thus relies exclusively on disagreement with the lower court's factual findings. Moreover, the argument is misguided. While the court in *Wickham* determined that prejudgment interest *may be* inappropriate where the defendant had no reason to know of the wrongfulness of its actions, that is not the case

here. *See Wickham*, 955 F.2d at 834 (emphasis added); Pet. App. 22. As the Seventh Circuit recognized, the district court *found* an unlawful intent. Pet. App. 22, 54. As a result, *Wickham* does not provide petitioner with any basis for asserting that prejudgment interest was improper.[3]

Finally, the petition asserts that the award of prejudgment interest conflicts with the law of this Court. Petitioner has failed, however, to identify any case law or reasoning with which the award conflicts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE D. LEVIEN, P.C.
VICTORIA L. BOTVIN*
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

Attorneys for Respondent

* *Counsel of Record*

October 14, 1999

---

3. The size of the prejudgment award is also consistent with *Wickham* and is simply the result of compounding interest during the time respondent had been deprived of the money owed to it. *Wickham*, 955 F.2d at 837.